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Md Nazli bin Sahid @ Said v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–6–01 OF 2012
ABU SAMAH, AZIAH ALI AND HAMID SULTAN JJCA
21 OCTOBER 2014

C *Criminal Law — Dangerous Drugs — s 39B(1)(a) — Trafficking in 1,059g of cannabis — Conviction and sentence — Appeal against — Whether prosecution proved its case beyond reasonable doubt — Whether appellant rebutted trafficking on balance of probabilities — Whether conviction for trafficking safe — Whether appellate interference warranted — Dangerous Drugs Act 1952 s 39B(1)*

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The appellant was appealing against the conviction and sentence of death for trafficking dangerous drugs. In this case, the appellant was technically caught red handed by a surveillance team with the drugs. The appellant alighted from his car carrying a white plastic bag in his right hand. On seeing the surveillance E team, the appellant threw the plastic bag underneath the car even before SP4 and his team could introduce themselves as 'police'. After reading the caution under s 37A of the Dangerous Drugs Act 1952 to the appellant, SP4 then inquired as to the contents of the plastic bag which the appellant was seen throwing. To this inquiry, the appellant replied 'Ganja kut'. Before this court, F the appellant raised issues relating to; (i) prejudicial evidence being allowed; (ii) discrepancies in the search list (omission); and (iii) the accused was left handed.

Held, dismissing the appeal; affirming the conviction and sentence:

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(1) There was no issue as to rebuttal witness to warrant any consideration to decide whether the prosecution has proved its case beyond reasonable doubt. Instead, the only issue here was whether the appellant has rebutted trafficking on the balance of probabilities. The trial judge had set-out the reasons for not accepting the defence (see para 8).

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(2) It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. In this case, there was sufficient material to support the charge and the view taken by the trial court on the relevant I issues was a reasonable view of the evidence on record. The court had followed *Radhi*'s direction (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169) and rightly applied the maximum evaluation and beyond reasonable doubt test. In consequence it was a safe decision and appellate intervention was not necessary (see para 10).

[Bahasa Malaysia summary

Perayu merayu terhadap sabitan dan hukuman mati kerana mengedar dadah berbahaya. Dalam kes ini, perayu secara teknikalnya ditangkap kerana membuat kesalahan, oleh pasukan pengawasan dengan membawa dadah. Perayu turun dari keretanya dengan membawa beg plastik putih di tangan kanannya. Ketika melihat pasukan pengawasan, perayu membaling beg plastik tersebut di bawah kereta sebelum SP4 dan pasukannya hendak memperkenalkan diri mereka sebagai polis. Selepas membaca amaran di bawah s 37A Akta Dadah Berbahaya 1952 kepada perayu, SP4 kemudiannya bertanya mengenai kandungan beg plastik yang dilihat dibuang oleh perayu. Kepada siasatan ini, perayu menjawab 'Ganja kut'. Di hadapan mahkamah ini, perayu membangkitkan isu-isu berkaitan; (i) keterangan menjejaskan yang dibenarkan; (ii) percanggahan dalam senarai carian (ketinggalan); dan (iii) tertuduh adalah kidal.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman:

(1) Tidak terdapat isu mengenai saksi yang dipanggil untuk mematahkan keterangan untuk mewajarkan apa-apa pertimbangan untuk memutuskan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Sebaliknya, satu-satunya isu di sini adalah sama ada perayu telah mematahkan pengedaran atas imbangan kebarangkalian. Hakim perbicaraan telah menetapkan alasan-alasan untuk tidak menerima pembelaan (lihat perenggan 8).

(2) Adalah nyata bahawa ia adalah di bawah kuasa pembicara fakta untuk menilai kualiti keterangan dan untuk menentukan sama ada keterangan atas rekod menjustifikasikan sabitan dan juga hukuman. Dalam kes ini, terdapat material yang mencukupi untuk menyokong tuduhan dan pandnagn yang diambil oleh mahkamah perbicaraan atas isu yang relevan adalah pandangan munasabah keterangan atas rekod. Mahkamah telah mengikut arahan *Radhi* (*Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169) dan telah menguna pakai dengan betul ujian penilaian maksimum dan melampaui keraguan munasabah. Oleh itu ia adalah sabitan yang selamat dan campur tangan mahkamah rayuan adalah tidak perlu (lihat perenggan 10).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321, SC (refd)
Krishnan & Anor v PP [1981] 2 MLJ 121, PC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Phrueksa Taemchim (Thailand) v PP [2013] 6 MLJ 808; [2013] 5 AMR 338, CA (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37A

Appeal from: Criminal Trial No 45A-18 of 2011 (High Court, Alor Setar)

RSN Rayer (R Nethaji Rayer & Co) for the appellant.
Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal against conviction and sentence of death for trafficking of drugs came up for hearing on 26 June 2013 and upon hearing the submission we dismissed the appeal. My learned brother Abu Samah bin Nordin JCA and learned sister Aziah bt Ali JCA have read the judgment and approved the same. This is our judgment.

[2] The appellant was charged as follows:

> Bahawa kamu pada 24 Disember 2010 lebih kurang jam 10.00 malam, di halaman rumah No. 33, Taman Sri Hartamas, Mergong, Alor Setar, di dalam daerah Kota Setar, di dalam negeri Kedah Darul Aman telah memperedar dadah berbahaya iaitu Cannabis seberat 1059 gram dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

BRIEF FACTS

[3] The appellant was arrested by surveillance team and technically was caught red handed with the drugs and to caution administered under s 37A had replied 'Ganja kut'. The learned deputy public prosecutor has summarised the facts and much judicial time will be saved by repeating the same. The summary reads as follows:

> [3] Briefly, on 24.12.2010, Inspector Farouk SP4 conducted a raid at house no. 33, Taman Sri Hartamas, Mergong, Alor Setar, Kedah. A man identified as Mat Tabligh

was arrested with 20.93 grams of cannabis. SP4 was informed that a man was on his way to deliver drugs to the said address at 10.00 pm.

[4] SP4 then divided his team to two for surveillance. At about 10.00 pm, a Proton Wira PDL 7718 arrived at the porch of the house. A man identified as the appellant alighted from the car carrying a white plastic bag on his right hand. The car engine was running and the car lights were on.

[5] SP4 instructed his team to approach the appellant. The appellant then threw the plastic bag underneath the car even before SP4 could introduce them 'police'. SP4 then read the caution under Section 37A and inquired as to the contents of the white plastic bag the appellant was seen throwing. The appellant replied 'Ganja Kut'.

[6] SP4 instructed Constable Izwan to retrieve the plastic bag from underneath the car. The plastic bag had AAB Made in China written on it. SP4 inspected the plastic bag and found a slab of dried plant material wrapped in transparent cellotape.

[4] Learned counsel before us raised three issues relating to (a) prejudicial evidence being allowed; and (b) discrepancies in search list (omission); (c) accused was left handed.

[5] In respect of prejudicial evidence and search list learned counsel concedes that no challenge was taken during cross-examination during the prosecution stage.

[6] In the instant case, there is no dispute that the accused was arrested after seeing he had thrown a packet and subsequently the packet contained drug. It is trite that in such a factual matrix the defence had to be called which was rightly done so and it is the duty of the accused to rebut trafficking on the balance of probabilities or least created some doubt in the prosecution case to say that the prosecution has not at the close of the whole case proved the case beyond reasonable doubt (see *Phrueksa Taemchim (Thailand) v Public Prosecutor* [2013] 6 MLJ 808; [2013] 5 AMR 338). For example, if appropriate rebuttal evidence is not lead at the defence stage by the prosecution in matters arising in the defence stage may be fatal for the prosecution (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705).

[7] Support for the proposition is found in a number of cases. In *Janab*'s *Key To The Law of Evidence*, (4th Ed), (2014) at p 164 in reliance of the following cases: (a) *Krishnan & Anor v Public Prosecutor* [1981] 2 MLJ 121; (b) *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; (c) *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321, the authors make the following observation:

In practice when the prosecution has given evidence and the defence has been called and evidence given the prosecution may be given another opportunity to rebut the evidence of the defence by calling witnesses further.

[8] In the instant case, looking at the defence we take the view that there is no issue as to rebuttal witness to warrant any consideration to decide whether the prosecution has proved its case beyond reasonable doubt. The only issue here is whether the appellant has rebutted trafficking on the balance of probabilities. The learned trial judge had written a 18 page judgment setting out the facts and law, and had considered the defence of the accused. The learned deputy public prosecutor had summarised the defence and it reads as follows:

> [7] The appellant's defence was that he was on his way with his wife SD2 to his mum's house for a wedding when Mat Tabligh called and requested him to come to Mat Tabligh's house as he wanted to repay his RM300.00 debt. When the appellant reached the house he could not see anything on the floor as it was dark when 2 men came and identified them as police.
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> [8] One of them had retrieved a plastic bag from underneath his car and when asked about the plastic bag, the appellant said he did not know anything about it.
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> [9] SD2 his wife supported the appellant's version that they were on their way to the mother's house for a wedding and the appellant received a call from Mat Tabligh. The appellant dropped SD2 and his children at the roadside of Tongkang Yard.

[9] The learned trial judge had set-out the reasons for not accepting the defence and it reads as follows:

> [31] Meneliti keterangan saksi-saksi, pendakwaan di akhir kes pendakwaan yang telah membuktikan bahawa OKT mempunyai milikan ke atas dadah seperti pertuduhan dan mengedar dadah berbahaya yang ditafsirkan di bawah s 2 ADB 1952, Mahkamah mendapati keterangan OKT (SD1) dan isterinya SD2 menunjukkan bahawa pembelaan yang dibentangkan adalah tujuan OKT ke rumah Mat Tabligh adalah untuk membayar hutang sebanyak lebih kurang RM1,300. Walaupun begitu keterangan SD2 tidak menyokong keterangan OKT kerana menurut SD2, OKT telah memarahi Mat Tabligh kerana menelefonnya supaya datang mengambil hutang itu.
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> [32] Mahkamah tidak dapat mempercayai keterangan SD2 ini kerana adalah tidak munasabah seseorang yang memberi pinjam wang untuk memarahi si berhutang yang datang untuk membayar hutangnya. Lebih-lebih lagi apabila mereka akan mengadakan kenduri perkahwinan adiknya sudah tentu pembayaran RM1,300 akan dapat membantu mereka untuk membuat persiapan kenduri itu.
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> [33] Mahkamah mendapati keterangan OKT yang menyatakan bahawa dadah dijumpai di bawah kereta tidak dapat menyangkal keterangan SP4 dan SP5 bahawa OKT lah yang mencampakkan dadah itu ke bawah kereta. Oleh itu, keterangan OKT merupakan penafian semata-mata dan tidak berasas sama sekali.

[34] Mengenai kegagalan pihak pendakwaan memanggil Mat Tabligh sebagai saksi pendakwaan, Mahkamah telah pun membuat keputusan di akhir kes pendakwaan di perenggan 23 alasan penghakiman yang mana-mana saksi-saksi pendakwaan yang lain telah memberi keterangan yang mencukupi bagi membolehkan mahkamah membuat keputusan walaupun Mat Tabligh tidak dipanggil oleh pendakwaan dan mahkamah mengekalkan keputusan itu di akhir kes pembelaan. Kedudukan kes *Ti Chee Hiang v Public Prosecutor* yang telah dirujuk semasa kes pendakwaan dan kes pembelaan oleh peguambela terpelajar berbeza dengan kes dihadapan mahkamah.

[10] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[11] In consequence it is a safe decision and appellate intervention is not necessary. Appeal is dismissed. The conviction and sentence by the High Court is affirmed.

[12] We hereby order so.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohammad